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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 616

DAN M. WHITE AND JOHN H. WHITE, PETITIONERS

v.

UNITED STATES OF AMERICA AND JOSEPH E. BROWN, UNITED STATES ATTORNEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 177-188) are reported in 98 F. Supp. 895. The opinion of the Court of Appeals (R. 204-207) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1952 (R. 207). The petition for a writ of certiorari was filed on February

28, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, as both courts below found, petitioners' disclosures to Treasury agents were voluntary, and not induced by promises of immunity from prosecution for income tax evasion.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Fifth Amendment:

> No person * * * shall be compelled in any criminal case to be a witness against himself, * * *

Internal Revenue Code:

> Sec. 145. *Penalties.*
>
> * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

On March 13, 1951, complaints were filed with the United States Commissioner in the Southern District of Mississippi against petitioners, charging them with evasion of their individual income taxes for the year 1944 (R. 178). The complaints were filed with the United States Commissioner for the purpose of tolling the statute of limitations, as provided in Section 3478 of the Internal Revenue Code.[1] Prosecution for the year 1945 likewise is contemplated (R. 205).

As independent proceedings, brought in the United States District Court for the Southern District of Mississippi, petitioners filed petitions and motions to suppress evidence which they asserted had been obtained from them by Treasury agents under an implied promise of immunity and which was intended to be used against them in violation of their constitutional rights under the Fifth Amendment (R. 2-9, 10-17). The District Court, after

[1] Section 3748(a), Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 3748(a)), provides:

> Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

taking testimony, denied the relief sought (R. 188), and an appeal was allowed with supersedeas (R. 195). In a supplemental order, the court restrained the United States Attorney and his agents from presenting the case to a grand jury until further order of the trial court or of the Court of Appeals (R. 200). The Court of Appeals affirmed the decision of the District court (R. 204-207).

The facts as found by the trial court may be summarized as follows:

Petitioners are half-brothers, one of whom (Dan M. White) resides in New Orleans, Louisiana, and the other (J. H. White) in Jackson, Mississippi. Dan M. White has been, during all times material hereto, associated with the Industrial Finance & Thrift Corporation in New Orleans, which is engaged in the brokerage of loans from local finance companies over the southern states. Two of the local finance companies from which it accepts paper are the White System of Jackson, and Friendly Finance Company, located in Jackson, Mississippi, they being the companies through which J. H. White transacted business. Apart from the rediscount of paper of the two Jackson, Mississippi, companies by Industrial Finance & Thrift Corporation, there was no business connection between the Mississippi and the New Orleans enterprises. (Fdg. 1, R. 177-178.)

The original returns filed by petitioners with the Collector of Internal Revenue at Jackson, Missis-

sippi, for the years 1942, 1943, 1944, and 1945, were concededly fraudulent (Pet. 3). Each of the petitioners filed amended returns for the calendar years 1942 to 1945, inclusive, in the circumstances set out separately as to each petitioner below, the amended returns having been filed on the following dates (Fdg. 2, R. 178):

Dan M. White, Amended Returns
1942, filed between March 10 and 15, 1946.
1943, filed April 1, 1946.
1944, filed April 1, 1946.
1945, filed May 29, 1946.

John H. White, Amended Returns
1942, filed August, 1946.
1943, filed early September, 1946.
1944, filed September 6, 1946.
1945, filed September 19, 1946.

For many years, the United States Treasury Department maintained a policy of not recommending criminal prosecution of taxpayers who had wilfully made fraudulent tax returns in those cases where the taxpayer, before an investigation of his returns was under way, made what the Treasury termed a "voluntary disclosure" to some revenue agent or other officer of his fraudulent misstatement.[2] (Fdg. 3, R. 178-179.) In 1946, this policy was known to the respective accountants in New Orleans and Jackson, Mississippi, who prepared the

[2] This policy was abandoned on January 10, 1952 (1952 C.C.H. Tax. Serv., par. 6079).

amended returns for the taxpayers, and to the agents of the Bureau of Internal Revenue who made an investigation of the returns of each of the petitioners. Under date of August 21, 1945, the then Secretary of the United States Treasury, Honorable Fred M. Vinson, writing as guest columnist in Mr. Drew Pearson's syndicated column "Washington Merry-Go-Round", announced the purpose of the Treasury Department to increase its efforts in the detection of fraudulent evasion of income taxes, and with respect to the "voluntary disclosure" policy stated as follows (Fdg. 3, R. 179):

> The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return. Monetary penalties may be imposed for a delinquency, for negligence and for fraud, but the man who makes a disclosure before an investigation is under way protects himself and his family from the stigma of a felony conviction. And there is nothing complicated about going to a Collector or other revenue officer and simply saying, "there is something wrong with my return and I want to straighten it out."

This policy statement came to the attention of both petitioners. The Treasury policy was further publicized in a release to the press under date of Oc-

tober 5, 1943, which also came to the attention of petitioner Dan M. White (R. 179).

1. *Summary of Separate Findings as to Dan M. White.*—From 1942 until the latter part of 1945, petitioner Dan M. White was involved in matrimonial disputes with his first wife as a result of which he had disguised income on the books of the Industrial Finance & Thrift Company, the corporation with which he was connected, for the purpose of preventing his former wife from finding out his true income, and for the purpose of evading the payment of income taxes. In October, 1945, about the time that final agreement was reached with an agent of his former wife, Dan M. White commenced assembling information necessary to straighten out his accounts to enable him to file amended returns, but he did not report his intention to file an amended return to the Collector of Internal Revenue. (Fdg. 4, R. 180.)

At no time did Dan M. White advise the Collector of Internal Revenue that his returns were false and fraudulent and that he desired to make a voluntary disclosure. By the time the copy of the final property settlement and agreement was received in February, 1946, he had information ready for an amended return for 1942 and a good part of that required for 1943 and 1944, but he did not so advise the Collector of Internal Revenue. About that time, he signed his amended 1942 return and issued a check for it

dated about March 10 or 12, 1946, which he left with his office with instructions to mail them to the Collector in Jackson, Mississippi, before March 15, 1946. He understood that he had until three years following the filing of each return within which to file a voluntary amendment, which understanding was shared by the Collector of Internal Revenue at Jackson, Mississippi. In the middle of February, 1946, Dan M. White left for Arizona on the advice of his physician, where he remained until about March 20, 1946. About the middle of March, 1946, he corresponded with the Collector respecting the Collector's request that a 1943 return, in addition to that for 1942 already filed, be gotten in promptly, apparently because of the effect of the Current Tax Payment Act. At that time, the Collector at Jackson was informed in writing that Dan M. White would amend his return for 1943 as soon as he returned to New Orleans. (Fdg. 4, R. 180-181.)

Upon Dan M. White's return from Arizona, he employed a certified public accountant, Mr. Lankston, to assist him with his amended return, advising him that since he had made a mistake in the 1942 amended return, he had decided that he needed the assistance of an accountant, and that he wanted to make a full disclosure. Thereafter, the accountant prepared the amended returns, which were filed as set forth above (*supra*, p. 5), from information supplied by Dan M. White. (Fdgs. 5-6, R. 181.)

On February 28, 1946, one Cuvillier, an agent of the Treasury Department, began an examination of the tax returns of the Industrial Finance & Thrift Corporation for the year ending July 31, 1944, during which examination the commission payments to Dan M. White were computed and it was found that although the return of compensation paid to Dan M. White, as shown by the books of the corporation, was $60,000, it was in fact $92,000. With the aid of Dan M. White's original returns, it could have been determined from the books of the corporation that Dan M. White had concealed his income. Agent Cuvillier was unable to obtain an explanation of the discrepancies from those in charge of the corporation's office, and on March 15, he withdrew until the return of Dan M. White from Arizona in order that Mr. White might have an opportunity to explain the discrepancies and advise whether his income had been concealed. (Fdgs. 8, 9, and 11, R. 182-183.)

When Dan M. White employed the accountant, Lankston, he had already been informed that Agent Cuvillier had been to the office of the Industrial Finance & Thrift Corporation and was making an investigation of its books, and that the agent had suspended the final examination of those books until he, White, would return and explain the discrepancies with respect to commission payments made to him (Fdg. 7. R. 181; Fdg. 11, R. 182-183.)

On March 26, Cuvillier encountered Mr. Lankston, the accountant, and had a conversation with him during which Lankston stated that he had been engaged to prepare an amended return for Dan M. White. Lankston told him he thought it would be better if he, Cuvillier, would wait until he, Lankston, had finished with his audit (Fdg. 12, R. 183). At no time did Lankston or Dan M. White report to Agent Cuvillier that White wanted to make a voluntary disclosure of unreported income (Fdg. 13, R. 183).

On April 14, 1946, William E. Logan, Revenue Agent, wrote the Collector of Internal Revenue at Jackson that his office in New Orleans had under consideration the income tax liability of Dan M. White for 1944 and requested that any amended return filed for Dan M. White be forwarded to him. On March 18, 1946, Dan M. White wrote the Collector of Internal Revenue at Jackson with reference to his 1942 amended return and stated that on his return to New Orleans he would prepare corrected returns for 1942 and 1943, but at no place in the letter did he mention the 1944 return nor did he state that he intended to make a voluntary disclosure of unreported income for the year 1944. On March 30, 1946, Lankston wrote the Collector at New Orleans that he was filing an amended return for Dan M. White for the year 1945 in order to take advantage of the Louisiana community

basis, but did not state that White had made a false return or that he intended to make a voluntary disclosure of unreported income. (Fdg. 14, R. 183-184.)

Agent Cuvillier in the meantime was selected as a conferee and the White cases were assigned on May 1 to Internal Revenue Agent E. D. Matheny and Special Agent Harold Holt of the Intelligence Unit for further investigation, and they completed the investigation. On November 17, 1948, they took sworn statements from Dan M. White and J. H. White. Before taking their sworn testimony the agents advised the Whites of their right to have an attorney, and also that any statements they might make could be used against them. After being so advised, the Whites made the voluntary statements here involved. (Fdg. 15, R. 184.)

Dan M. White is an experienced businessman and very bright. He has been admitted to practice law in Mississippi, but has had little experience as a practitioner. (Fdg. 16, R. 184.)

2. *Summary of Separate Findings as to J. H. White.*—J. H. White commenced to assemble information necessary to amend his 1942-1945 returns in April, 1946, and about June or July employed a certified accountant, J. W. Cocke to prepare them for him. Mr. Cocke advised him of the voluntary disclosure policy and that it was advisable if he had no reason to believe he was under

investigation by the Bureau to inform the Collector's office immediately of his intention to make good. He filed his amended return for the year 1944 on September 6, 1946, but he did not advise the Collector of Internal Revenue that he had concealed his income and that he desired to make a voluntary disclosure until the filing of his amended return. (Fdg. 20, R. 185-186.)

The investigation of J. H. White was assigned to the agents in May, 1946, and the examination was started in July, 1946. After the investigation started in July, 1946, and before the amended returns were filed, the agents contacted J. H. White in Jackson, Mississippi, at which time they told him his returns for 1942-1945 had been assigned to them for investigation and asked him if he intended to file any amended returns. He replied that his original returns were correct and that he did not intend to file amended returns. (Fdg. 21, R. 186.)

3. *Summary of Findings Relating to both Petitioners.*—Dan M. White and John H. White both cooperated fully through the investigation and voluntarily furnished to the agents all the relevant books, documents, canceled checks, and correspondence as requested (Fdg. 17, R. 184).

At no time during the entire investigation did the Government agents make any inducements or false representations or use any trickery or make any

promises of immunity to either of the petitioners in connection with the investigation (Fdg. 18, R. 185).

The agents of the Government were duly authorized to make the investigation of the income tax returns and would have been able to discover the concealed income from an examination of the books of the corporation, and from the income tax returns filed with the Government. The cooperation given by the petitioners was in response to questions touching their returns, which questions the agents had the right to ask them provided no false promises of immunity were given and no threats made or coercion used. (Fdg. 19, R. 185.)

The agents had a number of conferences, probably one hundred or more, with Dan M. White, and a great number of questions were asked and explanations given. There were no records seized at any time. The agents were permitted to take some of the records from Dan M. White's office in order that they might be copied or photostated and there are now in the files of the Treasury Department some of the copies or photostats. but no originals. Neither of the petitioners was ever advised by any of the agents or other officials of the Treasury Department that criminal prosecution was contemplated; nor did they tell either of the petitioners that criminal prosecution was not contemplated. (Fdg. 19, R. 185.)

ARGUMENT

We submit that the courts below were right in holding that there was no transgression of petitioners' rights in the manner in which the Treasury agents obtained information from petitioners.[3]

1. The "voluntary disclosure" policy as defined by various public statements of responsible Treasury officials was that criminal prosecution would not be undertaken of any taxpayer who made a voluntary disclosure of attempted fraud on the revenue before an investigation was under way. It is important to note that each of the announcements defining the policy contained the express condition that to gain its protection repentent taxpayers must make their disclosures of fraud before an investigation was begun.[4] Judged by this test, the attempts of petitioners to secure immunity by

[3] It is to be noted that criminal proceedings against petitioners have not advanced beyond the stage of filing a complaint with the United States Commissioner under Section 3748 of the Internal Revenue Code for the purpose of tolling the statute of limitations. It is not certain that petitioners will be indicted, and should they be indicted, it is not now certain what, if any, of the statements and submissions made by petitioners will be offered as evidence in the criminal prosecution. Hence, it would seem that this independent proceeding to suppress evidence may well have been premature. That question, however, was not raised in the courts below, and we are making no point of it in this opposition to the grant of a writ of certiorari.

[4] Honorable Fred M. Vinson, one-time Secretary of the Treasury, on August 21, 1945, wrote of the policy in a syndicated column as follows (R. 179):

> The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a return. Monetary penalties may be imposed for a delin-

disclosure were tardy and thereby ineffective. It is clear from the record that investigations of both petitioners had begun before they attempted to make their claimed disclosures, and it was so found by the trial court and by the Court of Appeals.

It is not contested that Revenue Agent Cuvillier began his investigation of the Industrial Finance and Thrift Corporation on February 28, 1946, during which investigation he discovered discrepancies of over $30,000 in commissions paid to Dan White (R. 182). Investigation of John H. White began in May, 1946, when his returns were assigned to Treasury agents for examination (R. 186). Neither petitioner attempted to make disclosures until the investigations were under way. Having failed to meet the prime requirement of the administrative policy, petitioners cannot now claim its protection. *United States* v. *Levy,* 99 F. Supp. 529 (D. Conn.); *United States* v. *Weisman,* 78 F. Supp. 979 (D. Mass.); *United States* v. *Lustig,* 163

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quency, for negligence and for fraud, but the man who makes a disclosure *before an investigation is under way* protects himself and his family from the stigma of a felony conviction. [Italics supplied.]

In a Treasury Department press release, dated October 5, 1945, the following language was employed:

Mr. Nunan again stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up deficiencies plus interest and civil penalties *before the Bureau has begun investigating their cases.* [Italics supplied.]

F. 2d 85 (C.A. 2), certiorari denied, 332 U.S. 775, rehearing denied, 332 U.S. 812.

2. Nor can petitioners pass their failure to meet the requirements of the "voluntary disclosure" policy and insist that it is enough that they thought they were making such disclosure in exchange for immunity, and were not disabused of that thought.

The trial court found that (R. 185): "At no time during the entire investigation did the government agents make any inducements or false representations or use any trickery or make any promises of immunity to either one of the petitioners in connection with the investigation." Clearly, on this finding, there would be no warrant for the suppression of the evidence here involved. Petitioners cite no authority, nor is there any, for the proposition that, nothing more appearing (cf. *In re Liebster*, 91 F. Supp. 814 (E.D. Pa.), discussed *infra*, p. 18) the Treasury agents were required to tender the advice that the "voluntary disclosure" policy was not deemed applicable to the petitioners, one of whom was a lawyer.

Consequently, petitioners' only real complaint can be that they were not informed that anything they might say would be used against them. The unrefuted evidence clearly shows that they were fully warned at the time they made their sworn, voluntary statements. (R. 44-45, 57-58, 96-97, 184.) Presumably, therefore it is petitioners' contention that they had a right to be warned at every stage

of the investigation, *viz.*, from the first contact with the agent, that any statement they might make would be used against them.

It is clearly no more essential for a revenue agent, deputy collector, or other Treasury agent, making a routine investigation, and lacking at the outset any evidence of fraud, to caution a taxpayer as to his rights than it is for a police or prosecuting officer to caution a suspect against whom it is sought to build a case. The rule, as laid down in *Wilson* v. *United States*, 162 U.S. 613, is that it is not essential to the admissibility of a confession that the person be warned that what he says may be used against him, but on the contrary, if the confession is voluntary, it is sufficient though it appears that he was not so warned. *Powers* v. *United States*, 223 U.S. 303; *United States* v. *Heitner*, 149 F. 2d 105 (C.A. 2); *United States* v. *Block*, 88 F. 2d 618 (C.A. 2); *Thompson* v. *United States*, 10 F. 2d 781 (C.A. 7); *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), certiorari denied, 338 U.S. 860.

Here, both courts below found (R. 185, 207) petitioners' statements and disclosures to have been voluntarily made, and a "seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of a very exceptional showing of error." *Comstock* v. *Group of Investors*, 335 U.S. 211, 214, and cases cited.

3. Finally, petitioners seek to distinguish the situation in their cases from *United States* v.

Lustig, 163 F. 2d 85 (C.A. 2), certiorari denied, 332 U.S. 775, rehearing denied, 332 U.S. 812, cited in the opinion of the Court of Appeals, and attempt to liken their case to *In re Liebster,* 91 F. Supp. 814 (E.D. Pa.). In *United States* v. *Lustig, supra,* the claim of voluntary disclosure was rejected for the same reasons relied upon here; namely, that the investigation had begun long before the petitioners revealed their fraud. As in the *Lustig* case, *supra,* the disclosure by the Whites would not have been made unless they knew the Government was actually on their trail, and their fraud would have been uncovered with or without their assistance. Their statements at that stage were prompted by a desire to help themselves as best they could. See also *United States* v. *Weisman,* 78 F. Supp. 979. (D. Mass.).

In his findings of fact and conclusions of law, the district judge concluded that the facts in the *White* cases are different from the facts in the case of *In re Liebster, supra,* and more nearly like the facts in the *Lustig* case, *supra. In re Liebster, supra,* is clearly distinguishable, since the taxpayer in that case at all times expressed the understanding to the agents that he was making a voluntary disclosure; yet the agents permitted him to submit incriminating evidence without warning him that his disclosure came too late. On the facts found, neither petitioner here suggested that a voluntary disclosure was being made until the investigation

was completed and prosecution had been recommended.

CONCLUSION

The decision of the court below is plainly correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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